STATE OF MICHIGAN

COURT OF APPEALS

DONNA BERGMAN,

Plaintiff-Appellee,

v

BRIAN DALE ANDERSON and JAYEANN MARIE ANDERSON,

Defendants,

and

RON'S AMERICAN HOUSE, d/b/a JOHNNY'S TAVERN,

Defendant-Appellant.

UNPUBLISHED
May 13, 2008

No. 276955
Luce Circuit Court
LC No. 05-004558-NS

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant Ron's American House, d/b/a Johnny's Tavern (defendant), appeals by leave granted the trial court's order denying its motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case arises from a fatal hit and run accident. Defendant Brian Anderson (Anderson), the allegedly intoxicated person (AIP), drank beer at defendant's tavern, and then stopped to pick up his son. Anderson was driving home when his vehicle struck and killed 15-year-old Dewey Bergman, who was skateboarding in the road.

Prior to the accident, Anderson arrived at defendant's tavern at approximately 6:30 p.m., and remained there until approximately 9:00 p.m. While there, he consumed four to six beers. Affidavit testimony provided by witnesses, including a waitress and a bartender, both of whom were trained to identify individuals who should not be served liquor due to alcohol consumption, indicated that Anderson exhibited no signs of visible intoxication, such as slurring his words, staggering, repeating himself, talking loudly, or having bloodshot eyes.

After leaving the tavern, Anderson drove to the home of Cathy Davis, the mother of his five-year-old son, to pick up his son before going home himself. Sasha Smithson, the babysitter, was also present when Anderson arrived. Both Davis and Smithson reported to police officers that Anderson was more affectionate than usual with Davis, which led both to believe that he had been drinking. However, neither observed him staggering, slurring his words, or having bloodshot eyes. In fact, Davis stated that she would not have let her son leave with Anderson if she had believed he was impaired. Anderson spent approximately 20 minutes at Davis's home.

Plaintiff brought suit against defendant claiming liability under the dram shop act, MCL 436.1801. Defendant moved for summary disposition, which the trial court denied on the basis that a genuine issue of material fact existed as to whether visible intoxication was observed by an objective observer.

The narrow issue raised by defendant in this appeal is whether there was sufficient evidence provided to create a question of fact as to whether Anderson was visibly intoxicated before or during the time defendant sold him liquor.

We review de novo a trial court's decision on a motion for summary disposition. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123; 693 NW2d 374 (2005). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The trial court must consider the pleadings, as well as depositions, affidavits, admissions, and any other documentary evidence. MCR 2.116(G)(5). However, such materials should only be considered to the extent that they would be admissible as evidence. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). Inferences should be drawn in favor of the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate if the opposing party fails to present documentary evidence establishing the existence of a material issue of fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

The dram shop act provides, in pertinent part:

> A retail licensee shall not directly or indirectly, individually or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated. [MCL 436.1801(2)]

When determining the Legislature's intent, we must first look to the statute's specific language. *Gauntlett v Auto-Owners Ins Co*, 242 Mich App 172, 177; 617 NW2d 735 (2000). The language at issue here, prohibiting service to a visibly intoxicated person, reflects the amendment to the statute enacted by 1972 PA 196. The original version of the dram shop act prohibited service to an intoxicated person. The revised language of the statute evidences the Legislature's intent that a plaintiff must provide evidence of visible intoxication in order to recover under the act. Therefore, the mere fact that an AIP consumed alcohol is not sufficient to establish that he was visibly intoxicated. *McKnight v Carter*, 144 Mich App 623, 629; 376 NW2d 170 (1985).

Our Supreme Court recently discussed the standard for liability in dram shop actions in *Reed v Breton*, 475 Mich 531; 718 NW2d 770 (2006), and reiterated that objective manifestations of intoxication are required:

> While circumstantial evidence may suffice to establish this element, it must be actual evidence of the *visible* intoxication of the allegedly intoxicated person. Other circumstantial evidence, such as blood alcohol levels, time spent drinking, or the condition of other drinkers, cannot, as a predicate for expert testimony, alone demonstrate that a person was *visibly* intoxicated because it does not show what behavior, if any, the person *actually manifested* to a reasonable observer. [*Id* at 542-543.]

In the instant matter, plaintiff attempted to satisfy her burden of showing visible intoxication by providing Anderson's plea hearing testimony, witness statements contained in the police report, and testimony given by witnesses in the investigation of Bergman's death. We are not persuaded that the proffered documents are sufficient to satisfy plaintiff's burden.

Statements in police reports are inadmissible hearsay. *Maiden v Rozwood*, 461 Mich 109, 124-125; 597 NW2d 817 (1999). Therefore, the trial court erred in considering the witness statements contained in the police report.

Even if the statements contained in the police report were admissible, the statements do not provide evidence that Anderson was visibly intoxicated. In fact, none of the documentary evidence relied upon by plaintiff indicated that Anderson exhibited any behavior that would lead an ordinary person to conclude that he was intoxicated. Instead, the statements related to the amount of alcohol Anderson consumed, the amount of time he spent drinking, and that at least one of his companions felt "buzzed." This kind of circumstantial evidence alone, without evidence of visible intoxication on the part of the AIP such as stumbling, talking too loudly, slurring words, or having bloodshot eyes, is not sufficient to establish visible intoxication. *Reed, supra*.

Plaintiff also contends that the witness statements in the police report contradict the affidavits provided by the same people two years later, and that, therefore, the affidavits were unreliable. However, the only factual contradictions between the witness statements and the affidavits relate to the amount of alcohol consumed by Anderson. Nothing in the witness statements indicated that Anderson was staggering, talking loudly, slurring his words, or had bloodshot eyes.

Further, we find unavailing plaintiff's contention that the witness statements and affidavit testimony provided by Davis and Smithson were sufficient to raise a genuine issue of material fact as to whether Anderson was visibly intoxicated. Plaintiff is required to show that the AIP's intoxication would be apparent to an ordinary observer. *Miller v Ochampaugh*, 191 Mich App 48, 60; 477 NW2d 105 (1991). While Davis and Smithson related that they believed that Anderson had been drinking because he was more affectionate than usual towards Davis, these observations were based on their familiarity with Anderson. It does not necessarily follow that a man who hugs and kisses a woman must be visibly intoxicated, especially when he has a relationship with the woman. In addition, aside from his unusually affectionate behavior, neither Davis nor Smithson reported, in either their police report statements or their affidavits, any other

observations related to Anderson's behavior that would constitute apparent visible intoxication. In fact, Davis stated in her affidavit that she would not have let her son leave with Anderson if she believed he was impaired.

Finally, plaintiff contends that statements made by Anderson at his plea hearing, wherein he stated his belief that part of the reason he could not stop his vehicle before hitting Bergman was that he had consumed alcohol, were sufficient to demonstrate a material issue of fact as to whether Anderson was visibly intoxicated. These statements do not provide evidence that Anderson was visibly intoxicated at the time he was served. The accident occurred at least 25 minutes after Anderson had left the bar, as he first went to Davis's home and stayed there for approximately 20 minutes. In addition, the fact that one's ability to drive was impaired does not necessarily mean that one was visibly intoxicated. See *Reed*, *supra* at 539 (holding that although the AIP drove under the influence of more than 20 beers and with a blood alcohol level of 0.215, there was insufficient evidence to infer visible intoxication). In the instant case, plaintiff has failed to present sufficient evidence to create a material issue of fact as to whether Anderson was visibly intoxicated. Defendant was entitled to summary disposition.

Reversed.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski